In the Supreme Court of the United States.

OCTOBER TERM, 1908.

W. E. RAKES, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 257.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

I.

This court is without jurisdiction to hear and determine this case on a writ of error to the district court, and it should therefore be dismissed.

If this court has jurisdiction, it must be either (1) because this is a case of a "conviction of a capital crime," or (2) because the constitutionality of a law of the United States is drawn in question.

(1) This is not a case of a conviction of a capital crime.

Plaintiff in error, with others, was indicted on September 13, 1907, in the District Court for the Western District of Virginia, for a conspiracy to injure, oppress, threaten, and intimidate one Peter Hall, a citizen of the United States, in the exercise and enjoyment of the right and privilege secured to him by the laws of the United States, of

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giving to the officers of the United States Government information as to the violation of the internal-revenue laws of the United States by plaintiff in error and others, the nature of the information being particularly described, and for, in carrying out said conspiracy, killing one Ann Hall. (Rec., pp. 1–5.)

A trial was had at the October term, 1907, when the jury returned the following verdict:

> We, the jury, find the within-named defendant, W. E. Rakes, guilty of conspiring as charged, and also guilty of murder in the second degree, and we fix his punishment for said last-mentioned offense at imprisonment in the penitentiary for fifteen (15) years. (Rec., p. 19.)

Upon this verdict judgment was subsequently pronounced (Rec., pp. 19 and 20); and it is the trial which resulted in this verdict and sentence that is sought to be reviewed by writ of error from this court.

Under the act of March 3, 1891 (26 Stat., 827, sec. 5), as amended by the act of July 20, 1897, ch. 68 (29 Stat., 492), a writ of error may issue from this court direct to a circuit or district court "in cases of *conviction* of a capital crime." The indictment against plaintiff in error was drawn under sections 5508 and 5509, Revised Statutes, and there is no doubt that he might have been convicted thereunder of a capital offense. The jury, however, found him guilty only of murder in the second degree.

By section 3664 of the Code of Virginia it is provided that—

> Murder of the second degree shall be punished by confinement in the penitentiary not less than five nor more than eighteen years;

and it was, therefore, beyond the power of the court or jury to inflict capital punishment upon plaintiff in error for the offense of which he was found guilty.

It will be observed that the statute, which fixes the jurisdiction of this court, provides that the party shall be *convicted* of a capital offense before his case can be removed directly to this court; and therefore the jurisdiction of the court does not depend upon the crime *charged in the indictment.*

In *Fitzpatrick* v. *United States* (178 U. S., 304, 307) Fitzpatrick was indicted for murder in the first degree, and the jury returned a verdict of guilty "without capital punishment." It was insisted by the United States that this court was without jurisdiction, because it was not a "conviction of a capital crime." In response to this contention the court said:

> It is clear, however, that, as section 5339 of the Revised Statutes inflicts the penalty of death for murder, the power given the jury by the act of January 15, 1897, c. 29, 29 Stat., 487, to qualify the verdict of guilty by adding the words "without capital punishment," does not make the crime of murder anything less than a capital offense, or a conviction for murder anything less than a conviction for a capital crime, by reason

> of the fact that the punishment actually imposed is imprisonment for life. The test is not the punishment which *is* imposed, but that which *may be* imposed under the statute.

Good Shot v. *United States* (179 U. S., 87) was a case presenting precisely the same state of facts, and in which the court, for the same reasons, held that it had jurisdiction.

It is clear, however, that under the rule there laid down, as well as under the positive and unambiguous terms of the statute, this court has no jurisdiction of the present case, because the accused was found guilty of murder in the second degree, for which the sentence of death could not be imposed, and he was not, therefore, *convicted* of a capital offense.

This distinction was recognized by the Circuit Court of Appeals, Sixth Circuit, in *Davis* v. *United States* (107 Fed. Rep., 754), and the jurisdiction of that court was maintained where under the indictment the defendant could have been convicted for a capital offense, but he was in fact found guilty only of a conspiracy.

(2) The constitutionality of no law of the United States is drawn in question.

It is true that counsel for plaintiff in error, in their brief, question the constitutionality of section 5509, Revised Statutes, under which, together with section 5508, the indictment was drawn, but

these sections have repeatedly been held to be constitutional by this court.

Ex parte Yarbrough, 110 U. S., 651.
United States v. *Waddell*, 112 U. S., 76.
Logan v. *United States*, 144 U. S., 263.
In re Quarles, 158 U. S., 532.
Motes v. *United States*, 178 U. S., 458, 462.

In *Logan* v. *United States*, *In re Quarles*, and *Motes* v. *United States*, both of said sections were involved, and while in the two former cases the question of constitutionality was not discussed, they being treated as constitutional, in the latter case both sections were expressly held to be constitutional.

It is insisted by plaintiff in error that even though section 5509, Revised Statutes, be constitutional, yet the court improperly construed the same. This, however, would not give this court jurisdiction, as it is well settled that in order to justify the removal of a case from a district or circuit court directly to this court upon the ground that the constitutionality of the law of the United States is drawn in question, the *validity* and not the *construction* of such law must be attacked.

Balt. & P. R. R. Co. v. *Hopkins*, 130 U. S., 211, 226.
United States v. *Lynch*, 137 U. S., 280, 285.
South Carolina v. *Seymour*, 153 U. S., 353.
Linford v. *Ellison*, 155 U. S., 503.

II.

The trial court did not err in overruling plaintiff in error's plea that the state court had first acquired jurisdiction of his person, and in proceeding with the trial of the case.

Plaintiff in error filed a plea in which he alleged in substance that, previous to the finding of the indictment against him in the United States court and his arrest thereunder, he had been indicted in the state court for the same offense and taken into custody by the state authorities. (Rec., pp. 7 and 8.) Without considering the technical questions raised with reference to the demurrer filed to this plea and the action of the court thereon, and its subsequent withdrawal and the filing of a replication thereto, and the courts action upon the replication and the proof introduced thereunder, we insist that no question is here presented of which plaintiff in error can take advantage. The plea presented only a question of comity existing between the United States and the State of Virginia; and by the previous finding of an indictment by the state court and the arrest of plaintiff in error by the state authorities he was not vested with a right to be first tried in the state court.

A similar question was presented to the Supreme Court of the State of Illinois in *Mackin* v. *People* (115 Ill., 312), and with reference thereto the court said:

> It is claimed, however, on the part of the petitioner, that although Mackin was per-

> sonally present in court during the trial of the cause, although there was actual control of his person, still that the fact that he had been previously arrested and had previously given bail for his appearance in the United States circuit (district) court, rendered that presence as to him and as to the conviction which followed, a fraud upon the law and a nullity, so that in construction of law there was no jurisdiction of the person. We are not able to coincide in this view. We concede the position established by the numerous authorities that are referred to in the petition, that where a party commits offenses against two or more jurisdictions, the jurisdiction first obtaining custody of the defendant is entitled to proceed and try him. That, however, is a matter more of comity, and in order to avoid unseeming strife between conflicting jurisdictions, than as a matter of right to the defendant. We do not recognize that a defendant who is guilty of crime has a constitutional, statutory, or common-law right absolutely to be tried for one offense before he is tried for another offense.

This rule was followed by District Judge Morrow in *In re Fox* (51 Fed., 427, 430).

With reference to the extradition of parties from one State to another, the general rule is that—

> It is not a cause for exemption from prosecution for a crime that the accused was illegally arrested in another State and unlawfully brought within the jurisdiction of the

State against which he offended. He is not protected from prosecution even if he is kidnaped in the other State and brought into the State without a semblance of right. It follows therefore that he is not wronged by being subjected to its jurisdiction, although the requisition proceedings were not strictly legal. (19 Cyc., 99.)

Mahon v. *Justice*, 127 U. S., 700, 707.
Kerr v. *Illinois*, 119 U. S., 436.
State v. *Ross*, 21 Iowa, 467.
In re Dows, 18 Pa. St., 37.
State v. *Smith*, 1 Bailey (S. C.), 283.
Brookin v. *State*, 26 Tex. App., 121.

In *New Jersey* v. *Noyes* (Fed. Cases, No. 10164) the court well said:

A person arraigned for the commission of a felony can not plead in bar that he ought to be excused from answering the charge because other parties trespassed upon his personal rights. It is confounding of matters which are essentially separate and distinct. It is a claim on the part of the accused that his criminal violations of the law are to be condoned by his personal injuries. It is asking a court to suspend its most responsible duties, to wit, the trial of alleged offenders against the penal code of the state, while the persons charged with the crime are instituting preliminary investigations into the methods adopted to bring them within its jurisdiction. Such a course, for obvious reasons, is allowable in a civil suit between private litigants, but, for like obvious reasons,

can not be and never has been allowed in criminal proceedings, where the object of the prosecution is to punish an offender against the public.

The cases of *Taylor* v. *Taintor* (83 U. S., 366) and *In re James* (18 Fed., 853), cited in plaintiff in error's brief, have no bearing upon this question. In *Taylor* v. *Taintor* the court held that where a person had been indicted and placed under arrest in one State and had executed his bond for appearance at the next term of court, and had subsequently gone into another State, and had there been extradited at the instance of the governor of a third State, and was held in custody by the authorities of such third State, and could not therefore comply with the conditions of the bond executed in the first State, such facts did not relieve the sureties on said bond from liability. This case, of course, did not involve the validity of the conviction and sentence of the accused himself. The court held in *In re James* that as a matter of comity between a federal court and a state court, where the right of a State to appear by its judicial officers to object to proceedings to remove a prisoner from the jurisdiction of its courts fully appears, the accused will be turned over to the state authorities, because such a course "is necessary to avoid unseeming conflicts between federal and state authorities," but there was no intimation that this would be done for the benefit of the accused himself.

In the present case the record discloses that there was no friction whatever with reference to these proceedings between the state and federal courts. The evidence introduced before the trial judge on the question raised by the plea and replication shows that it was largely at the instance of the commonwealth's attorney, Mr. Hooker, that the United States authorities investigated the crime of which plaintiff in error was accused and returned against him an indictment; that he imparted to the officers and agents of the United States Government all the information he possessed, and gave them such advice as he deemed to be beneficial, and encouraged them in making the investigation and procuring the indictment, the reason being, as stated by Mr. Hooker, that the State of Virginia had appropriated practically no funds to make investigations of this character. .(Evidence of Saml. H. Hoge, Rec., p. 23–26; E. P. McAdams, Rec., p. 30–31; S. A. Thompson, Rec., p. 41.)

Mr. Hooker, the commonwealth's attorney, was himself present at the hearing of this plea, and at the instance of the court was called to the witness stand, and fully corroborated the testimony given by the Government officers, and among other things testified with reference to a continuance of the case pending in the state court, that when the case was called he stated in substance to the court that it was passed because of the fact that the

Federal Government had taken charge of the case, as he understood (Rec., p. 36). In regard to a conversation he had had with United States Attorney Moore relating to this case, he testified:

> I understood, and I think that was understood by Mr. Moore, Mr. Hoge, and myself, when we first discussed this case in Danville, that we could afterwards—that there could be no conflict, that we would not fall out about where the case was tried. The main object in view, and I believe on the part of these other gentlemen, was to get justice done. I have always been under the impression since the matter came up that the Federal court had jurisdiction in the matter if they cared to exercise it. I thought if they tried the case that I would render them any service just as cheerfully as they would render it to me if it was tried in the state courts.
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> It is possible that I may have started them after Wm. E. Rakes, and I don't know that I ought to say they have hindered and delayed me, because if the Federal authorities had not taken charge of it I would have had a trial of it before now. I would have pressed for a trial, but since the Federal authorities had charge of it I have not attempted to have a trial in the Circuit Court of Patrick County. (Rec., p. 39.)

Subsequently the following question and statement was put to Mr. Hooker by the court: (Rec., p. 40):

> Will you now kindly state your attitude as commonwealth's attorney with reference to said matter? To put it otherwise, Mr. Hooker, if you feel that your duty as commonwealth's attorney calls on you to make a motion in this court to the effect that it do not proceed further with the trial of Wm. E. Rakes and that he be released from the custody of the marshal, in order that you may proceed with a prosecution in the State court, my opinion is that this court should not proceed with this trial. If, however, you do not desire or feel constrained to make such motion, then I feel that there would be no breach of comity in proceeding with said trial, and that the judgment on the plea should be against the defendant.

Thereupon he asked time to consult with the judge of the circuit of which he was commonwealth's attorney, and time being given he conferred with said judge and returned to court, and then announced his determination not to move for the surrender of the custody of the plaintiff in error in the following language:

> I do not desire to make any motion that this court surrender the custody of William E. Rakes or that he be remanded to the custody of the circuit court of Patrick County for trial of the case there pending against him. I will further say that I have

> seen Judge Harvey since Saturday and have discussed this case with him and the jurisdictional question that has been put up to me, and he stated, and authorized me to state, that he felt that the ends of justice were more desirable to be attained than any jealousy about jurisdiction of courts. I will also further state that so far as I am concerned I feel that I would be breaking faith with the district attorney's office if I in any way interfered with the prosecution of the case against Rakes, pending here; and in view of all the circumstances of the case, and after a full conference with Judge Harvey, I feel that it is my duty as commonwealth's attorney of Patrick County to go on record declining to make the motion to remand. (Rec., p. 42.)

And in answer to a subsequent question by counsel for plaintiff in error, he stated—

> I most positively and emphatically decline to make the motion, and, as heretofore stated, I am doing this with the full approval of the judge of the Circuit Court of Patrick County. (Rec., p. 43.)

It would indeed be a novel rule which would permit plaintiff in error to escape punishment for a crime in the United States court, simply because he had previously been arrested under an indictment found by a state court, when the state authorities were giving aid to the federal authorities in the prosecution of the case in that court, and were in that court not only expressing their willingness

that it might proceed with the hearing, but expressly and emphatically refusing to ask that he be turned over to the state authorities that he might be proceeded against in the state court. Under such circumstances, the rule of comity would rather require the United States authorities to proceed with the trial, inasmuch as the state authorities had expressed a desire that such be done.

III.

The court did not err in overruling the demurrer to the indictment.

The demurrer is based upon the assumption that the material ingredients of the offense are charged as conclusions of law, and were not charged with sufficient certainty. (Rec., pp. 14 and 15.) However, the argument in plaintiff in error's brief takes a much wider scope, and it is also insisted, (1) that section 5509 is unconstitutional, and (2) that the offense is not properly charged in the indictment, or rather that two offenses are charged in each count.

Neither of these contentions is well taken, for the following reasons:

(1) Section 5509, Revised Statutes, is constitutional. We have heretofore cited three cases, to wit, *In re Quarles*, *Logan* v. *United States*, and *Motes* v. *United States*, in which this section has

been enforced by this court, and in the last one of which it was said that—

> No question has been made—indeed none could successfully be made—as to the constitutionality of these statutory provisions.

No juggling of words can place such a construction upon section 5509 as would make it embrace crimes cognizable by the States alone and thus bring it in conflict with the Constitution. When sections 5508 and 5509 are read together, the meaning is not at all obscure; nor can the latter section admit of the meaning contended for by counsel for plaintiff in error that it was intended to embrace every act committed by a conspirator described in section 5508, from the time of the formation of the conspiracy until the consummation of the same. The illustration used by counsel on page 25 of his brief, that one of such conspirators may be hurrying along a highway to the appointed rendezvous and may meet an ancient enemy, a rival in a love affair, and allay his haste and for revenge commit an assault upon such enemy, well shows the absurdity of such a contention. An assault of this kind is not committed "in an act of violating" section 5508; for certainly, the postponement of the conspiracy for the purpose of wreaking personal vengeance upon another party is not an act done in furtherance of the conspiracy; nor can it be properly said that

any act of any character that may be done by such a conspirator during the time the conspiracy is in progress of consummation, which is not done in furtherance of the conspiracy, but outside and independent of the same, is done "in the act of violating" the provisions of section 5508.

Furthermore, it is perfectly clear that no independent offense is created by section 5509, but that it only provides for an additional penalty in case the offense described in section 5507 or 5508 is attended with the aggravating circumstances described in said section 5509.

The purpose of this section is perhaps more fully described by Judge Severens, in delivering the opinion of the Circuit Court of Appeals, Sixth Circuit, in the case of *Davis* v. *United States* (107 Fed., 753, 755) than elsewhere, in the following language:

> Counsel for the plaintiff in error, who submits the case on a brief, alleges six grounds on which he contends for a reversal of the judgment, the first two of which may be considered together. They are: First. In the first place, we insist that the indictment does not charge the crime of conspiracy as such, but alleges the existence of the conspiracy for the sole purpose of giving the court jurisdiction of the crime of murder. Second. The crime of murder and the crime of conspiracy are two separate and distinct offenses, and the crime of murder does not include or embrace the crime of

conspiracy, and defendant can not be tried for two separate and distinct offenses at the same time.

These contentions are based upon a misconception of the effect of sections 5508 and 5509. They do not contemplate two distinct offenses against the United States. Only the conspiracy is of federal cognizance, and it is that offense which is made punishable. If, in the prosecution of it, a thing is done which is a crime by the laws of the State, the conspiracy is punishable by a measure of punishment equal to that prescribed by the law of the State for such other crime. But it is an aggravation merely of the substantive offense of conspiracy. If the latter is not proven, there can be no conviction for the offense which constitutes the aggravating circumstance, and the proceeding falls to the ground. It is plainly indicated in *Motes* v. *U. S.* (178 U. S., 458; 20 Sup. Ct., 993; 44 L. Ed., 1150) that this is the view taken of these sections by the Supreme Court. It can not be doubted that it was within the power of Congress to deal with such a conspiracy and impose such punishment therefor as it should deem proper; and, having such authority, it was competent to take notice of such incidents of violence and wrong as were likely to happen in the prosecution of such combinations, and to measure the punishment by that which is prescribed by the local law for such acts when made,

of themselves, the subject of punishment. Though measured by those laws, the penalty is imposed by the law of the United States.

(2) The offense is properly described in the indictment.

Plaintiff in error insists that in each of the two counts of the indictment two offenses are charged, to wit: The offense of a conspiracy in violation of section 5508, Revised Statutes, and the crime of murder in violation of the laws of Virginia. It is apparent that this insistence is not sound, inasmuch as section 5509 does not create an independent offense, but only prescribes a penalty. Consequently, the crime of murder in violation of a State law is not an offense under these statutes, but such offense and the necessary ingredients thereof are properly charged in an indictment drawn under section 5508, in order that the penalty prescribed therefor may be imposed by the court or jury.

Nor is the offense of murder charged in the indictment as a separate and distinct offense, but it clearly appears from the allegations thereof that the facts with reference thereto are charged merely as an aggravation of the offense of conspiracy, and to justify the infliction of the penalty prescribed by section 5509.

Without repeating in detail the various allegations of the indictment, we insist that each of the counts thereof are not only sufficient in substance, but that all the essential ingredients of the offense

and the facts necessary to constitute the same, as well as those essential for the infliction of the penalty prescribed by section 5509, are fully and correctly set forth. (Rec., pp. 1–5.)

We further insist that inasmuch as the record fails to disclose that the questions on the demurrer now presented in the brief and argument of plaintiff in error, except the insistence that the indictment charges a conclusion of law, were not raised in or considered by the court below, they can not be considered by this court.

IV.

The evidence is not only sufficient to support the verdict of the jury, but it conclusively demonstrates plaintiff in error's guilt.

A brief summary of the most important items of evidence is as follows:

It appears that in the section of country where this crime was committed, there had been located a large number of illicit distilleries; in fact, it seems to have been a perfect nest of lawlessness in this respect. Peter Hall, a boy about 17 years of age, in the early part of December, 1906, reported to the revenue officers the fact that William E. Rakes was conducting an illicit distillery, and on December 15, 1906, the officers, acting on the information thus obtained, destroyed Rakes's distillery. (Evidence Peter Hall, Rec., pp. 47–48; E. Parr, Rec., pp. 78–79; J. W. Staples, Rec., p. 86.) About the first of March, 1907, Hall also

reported to the officers that Grover Beamer was conducting an illicit distillery, and on the night of March 6 the officers, in company with said Hall, destroyed this distillery. (Evidence Peter Hall, Rec., p. 48; H. L. Lawson, Rec., pp. 82–85; J. W. Staples, Rec., pp. 86–88.) About a week after Hall had reported Rakes's distillery, he told Rakes's brother-in-law, Chas. Nowlin, what he had done. (Evidence Peter Hall, Rec., p. 70.) After this he was arrested and put in jail for trespass at the instance of Nowlin. (Evidence J. W. Staples, Rec., p. 88.) And he appears to have been both before and after this persecuted with numerous petty prosecutions at the instance of Rakes and his relatives. (Rec., pp. 54–55.) Rakes told Sam Hall during the summer before the murder that he was a moonshiner, and if a man reported him he would kill him. (Evidence Sam Hall, Rec., pp. 99, 100.) About the first of March, 1907, Rakes asked J. H. Dillon, a justice of the peace, to fine Peter Hall $100 for carrying a pistol, stating that he would be unable to pay the fine and the revenue officers could not pay it, and he would have to go to jail. (Evidence J. H. Dillon, Rec., pp. 89, 90.)

Alexander Rakes, sometime before Christmas, 1906, bought some whisky from William E. Rakes, and he told the witness at that time that Peter Hall had reported his distillery, and had damaged him some forty or fifty dollars. (Evidence Alex. Rakes, Rec., p. 74.)

When the witness J. W. Staples returned from the raid upon Beamer's distillery, in which it was destroyed, he met William E. Rakes on the court-house steps, and said to him that they had cut up another still in his neighborhood, and Rakes replied, "Why are you all allowing Peter Hall to report his own distilleries? By G—d, aren't you all going to do anything with him for it?" Witness told Rakes that if he would have a warrant issued for Hall and furnish evidence he would execute the papers, to which Rakes replied, "No, it don't seem like you all will. You all let him report his own distilleries, it seems like; G—d d—n him, he ought to be killed." (Evidence J. W. Staples, Rec., pp. 88–89.)

The murder occurred on the fourth Sunday night in March, and on the Saturday before Rakes and Grover Beamer were together at some kind of a gathering. (Evidence Geo. L. Roberson, Rec., p. 131.) On Sunday, before the murder that night, William Rakes, in company with Peach Rakes, Will T. Rakes, George Booth, George Martin, Peter Martin, and Cal Mack Alexander, was at Peach Rakes's distillery, about five miles from the residence of Ann Hall, and William E. Rakes had with him a Winchester shotgun, and he, George Martin, and George Booth left together, and after they had gone a short distance they called Peach Rakes to them and had a talk, and Peach Rakes went off with them, but came back in a short time, and again left about a half hour before

sundown. (Evidence James Emerson, Rec., pp. 90–91.) William Rakes arrived at this distillery about 10 o'clock in the morning (Rec., p. 90), and it appears to have been probably an hour before sundown when he left (Rec., p. 93). Wm. Rakes was the owner of a 12-gage Winchester shotgun. (Ev. Geo. Brammer, Rec., p. 128.)

Grover Beamer spent a portion of his time with George L. Roberson, and when there he slept with Henry Roberson. About 12 o'clock on the day before the shooting, Peter Hall saw Henry Roberson at Ann Hall's, and Grover Beamer was at George Roberson's that evening, and left his house between sundown and dark, and next morning returned to Roberson's from the direction of Ann Hall's house. (Evidence Peter Hall, Rec., p. 71; George Roberson, Rec., p. 131.)

Peter Hall's home was with his aunts, Ann and Jane Hall, but at times he was at Elizabeth Hall's, the mother of one Sam Hall, and he stayed there a portion of Saturday night and Sunday, but on Sunday night was at his aunt Martha Thomas's. (Evidence Peter Hall, Rec., pp. 47, 67.) Sam Hall was on different occasions with Peter Hall hunting for stills. (Evidence Sam Hall, Rec., pp. 100, 105, and 106.) Sam Hall testifies that he was living with his aunt Elizabeth and was there the night the murder occurred; that Grover Beamer and a number of other persons came to the house in the fore part of the night, and Beamer burst the door down and searched the house for Peter Hall, saying that

he wanted him, and telling witness that if he told what had occurred he would kill him; that Beamer was the only person who came into the house, but that he heard Wm. E. Rakes's voice on the outside; that Beamer asked him for some matches and he replied that he had none; that they remained there but a short time, and when they left witness heard them say they would get Peter Hall at the next house; and that they left, going in the direction of Ann Hall's house. Witness was sitting on the bed, and the door opened back against the foot of the bed, and he consequently could not see anyone at the door or outside the house. (Rec., pp. 98–99.)

Elizabeth Hall, with whom Sam was living, testified that William E. Rakes, Grover Beamer, and Charlie Turner came to her house, and that Grover Beamer burst the door down; that they called for Peter Hall and searched the house for him; that two of them drew their guns ready to fire, in order to kill Peter Hall as he came out of the house; that she would not let them come into the house, and Will Rakes said they were going to kill her if she did not let them in. Rakes was there at the door and helped to push it open, and she saw as many as four guns in the crowd, but Grover Beamer was the only one who came into the house; soon next morning she heard of Ann Hall being killed. (Rec., pp. 95–96.)

This witness appears to have been rather deaf, and the defense manifestly relied upon this fact to

weaken her testimony as to what was said. On this night, however, the moon was shining brightly, and it was no trouble for her to recognize any person who was standing in the door or yard, and furthermore no attack is made upon her character.

The only eye-witness of what occurred at the time Ann Hall was killed was her sister, Jane Hall, who testified that after midnight, between 1 and 2 o'clock, she heard their dog bark, and then heard the report of a gun. She got up and went to the door and saw a bunch of men; they divided and went around the house and commenced shooting into the house; she opened the door and left it open; her sister Ann started toward the fire and said her arm was ruined, and then fell to the floor and said: "I am done, I am done." That after they stopped shooting, Grover Beamer burst the door open and came into the house, and plaintiff in error, and a bunch of men came to the open door, and she knew Rakes as soon as she saw him. That he came up on the southwest side of the house and she asked him to come and help her with her sister, and he replied, "Let her lie and sleep while she can." That Grover Beamer came into the house and tore the things up and asked her where Peter Hall was, and she replied that Peter Hall did not stay there, and he said: "The man I am going to have before I leave here" (referring to Peter Hall); and then he said with reference to Ann Hall, who was lying on the floor: "I have seen a heap of people in this fix;" that when

she spoke to plaintiff in error she called him Will Rakes, and he was then standing at the door, and Beamer was in the house lighting matches and hunting for Peter Hall and tearing things up; and he turned over the molasses and threw the table out of the door.

That it was a light, moonshiny night and she saw five men, and there were more on the outside; and she started out to see who they were, but they said they would shoot her if she came out there. (The door, which was riddled with shot, was presented to and indentified by witness.) Witness stated that she was afraid they would burn the house with her sister Ann in it, and consequently tried to get her to the door and pulled her in that direction; and that she lived not over ten or fifteen minutes after she was shot. Witness then went after some parties, and Robert E. Lee and Gillie Thomas came back with her. She thinks there were 9 shots fired, 8 of which were fired into the house. (Rec., pp. 108–112.)

It appears that 28 shot had entered the body of the deceased Ann Hall, scattered from her hip to shoulder, and one had entered the cavity near her heart. (Evidence Dr. L. C. Dickerson, Rec., p. 157, 158.)

W. A. Elgin, Gillie Thomas, and Ben Hall went to Jane and Ann Hall's house that night, and Mr. Hooker, the commonwealth's attorney, was there during the following day, and they all testify that the furniture in the house was scattered about;

that there was a large amount of molasses spilled on the floor, and that the door had been riddled with shot, as had also a window, and that a number of 12 and 16 gauge shells were lying in the yard, thus corroborating in every particular as far as physical conditions could do so the testimony of Jane Hall as to what occurred at the time of the murder. (Rec., pp. 123–124; 125–126; 126–127; 154–155.)

Moreover, Beamer, who had previously been convicted, was placed upon the witness stand, and his counsel stating that he intended to appeal Beamer's case, and the court informing him that he was not bound to testify, he refused to make any statement with reference to any material fact. (Rec., p. 132.)

Plaintiff in error Rakes, when arrested under a state warrant, undertook to testify in his own behalf, and at first stated that he was not away from his home during the entire day before and the night of the shooting, but afterwards stated that he was the day before down at Turner Rakes's mill. (Rec., p. 155; evidence J. H. Dillon, Rec., p. 157.)

The only evidence offered by the defense was a number of witnesses to testify as to the character of Jane Hall and Peter Hall and Sam Hall; also Will T. Rakes (not plaintiff in error), who testified that on Sunday he was at Peach Rakes's distillery with William E. Rakes and others, but that he remained at home the night of the murder, and his

wife, who corroborated him as to his being at home. (Rec., pp. 162, 165.) It can not be seen how this testimony is of any importance whatever.

We submit that no impartial person can carefully read the testimony in this record and reach any other conclusion than that plaintiff in error, together with Grover Beamer and a number of other parties, conspired together to injure and intimidate, and in fact to kill Peter Hall, because of the fact that he had informed against them with reference to their illicit distilleries, and that in carrying out this conspiracy on that night they went to the house of Ann Hall, and believing that Peter Hall was therein fired a number of shots into the house, one of which took effect in the body of Ann Hall, as a result of which she died.

One of the strongest corroborating circumstances is the fact that notwithstanding the sympathy of that entire community with these conspiritors, which is shown in the cross-examination of the various witnesses introduced to impeach the charter of the Government's witnesses, yet there is not a single item of material evidence offered on behalf of plaintiff in error. The court, therefore, properly refused to exclude the entire testimony and thus direct a verdict for the defendant.

V.

The court did not err in ruling adversely to plaintiff in error upon the following questions of evidence:

(1) Peter Hall was asked the following question by the district attorney: Question. How many

illicit distilleries have you seen there on the land of William E. Rakes and C. P. Nolin and Robert E. Lee during the last five years? To this question defendant objected, which objection was by the court overruled, and the witness answered: Answer. "I don't remember that I have seen any on William E. Rakes' land. As to C. P. Nolin's, I don't reckon there is a branch on his land anywhere that a distillery could be put up, but that there is one." (Rec., p. 170.) C. P. Nolin was Rakes' brother-in-law, and had been engaged with Rakes in instituting petty prosecutions against Peter Hall. (Rec., pp. 54, 55.)

The verdict can not be set aside on account of this ruling of the court, because,

First. No ground for the objection was stated.

Second. The objection was not to the answer, but to the question as a whole, when certainly it was competent to show what distilleries, if any, witness had seen upon the land of William E. Rakes.

Third. The fact that there were and had been numerous distilleries in that locality, many of which were upon the property of Rakes' brother-in-law, tended to show that the conspiracy proven was against Hall, as an informer against illicit distilleries.

Fourth. The evidence was of such character as not to materially prejudice plaintiff in error even if it were incompetent.

(2) The following occurred on the examination of witness Alexander Rakes: "Question. Have you been threatened by any one interested in this prosecution since you came here? Answer. No; not particularly. Question. How about Bill Turner, the father of Charlie Turner? To which question the defendant objected, the objection being overruled by the court, and the witness answered: Answer. He met me on the street and took me—— Witness was here interrupted by the following question from the district attorney: Question. So he met you on the street. What did he say to you? Answer. He said that I had better be careful, that if one side did not get me the other would. To which action of the court the defendant, by counsel, excepted." (Rec., p. 171.)

This action of the court is not a reversible error, because,

First. No ground for the objection was stated.

Second. It appears that this same witness had been called once before and did not tell of this circumstance, and the purpose of the district attorney was to show that it was omitted by witness on the previous examination on account of these threats (Rec., p. 73), and thus induce the jury to place credence in the statement, although told them for the first time. For this purpose it was certainly admissible.

Third. The evidence was not material or injurious to plaintiff in error.

(3) The district attorney asked witness Alexander Rakes whether or not he had a conversation with William E. Rakes after the still had been cut up by the officer. To this question objection was interposed on the ground that the time and place of the conversation should be stated, which objection was by the court overruled. (Rec., p. 171.)

This ruling of the court was proper, because,

First. Rakes being a defendant and not a witness, it was not necessary for the witness to state the time and place of the conversation.

Second. Witness was subsequently cross-examined by counsel for plaintiff in error, and he had opportunity to have witness fix the time and place of the conversation if he deemed such fact material.

Third. The failure to fix the time and place of the conversation was immaterial, and the record fails to disclose how it could in any way have injuriously affected plaintiff in error.

(4) During the examination of witness, Ben Hall, the Government was permitted to exhibit to the jury a gun which witness stated looked like the gun that he had seen in the possession of Grover Beamer, one of the alleged coconspirators who was indicted with plaintiff in error. At the same time there were also exhibited some shells, and counsel for plaintiff in error stated that they had no objection to the shells. (Rec., p. 132.)

There is no dispute that Ann Hall, the deceased, was killed by the firing of shot from a gun, and that Grover Beamer had a gun of the same char-

acter as the one exhibited, and that shells of this number and character had been sold Beamer before the killing by Geo. Roberson (Rec., pp. 132, 133), and the same kind of shells were found empty in Ann Hall's yard the day after the shooting.

We are unable to see how, under these circumstances, the mere introduction of a gun could prejudice the jury against plaintiff in error. Certainly it could have no more serious effect than the shells, which were introduced with the consent of counsel for plaintiff in error.

(5) The court's action in refusing to permit the wife of plaintiff in error to testify as to his whereabouts on the night of the alleged murder, is assigned as an error. (Rec., p. 172.)

This action of the court was correct, inasmuch as plaintiff in error was not being tried on a charge of murder under the laws of the State of Virginia, but was being tried for an offense committed under section 5508 of the Revised Statutes of the United States, and in accordance with the rules of evidence governing the United States courts.

(6) Plaintiff in error offered to prove by J. J. Brammer that Peter Hall was a notorious and offensive character in the community; that the better people in the community were afraid to leave their homes unprotected because of his dangerous character; that the said Peter Hall had made threats against parties other than the defendants charged in the indictment that he would destroy their property, and that such parties took

precaution to prevent such destruction; that the witness Brammer was employed by a brother-in-law of the defendant who resided in that vicinity to watch his barn and to look out for Peter Hall, who had made threats against him. The court, upon objection of the Government, declined to permit proof of said facts, and this action of the court is assigned as error. (Rec., p. 172, 173.)

It will be observed that none of the threats mentioned were made against plaintiff in error Rakes, nor does it appear who the brother-in-law was against whom an alleged threat was made, or what were the relations between such brother-in-law and Rakes, or whether, therefore, such a threat would be calculated to excite the hostility of Rakes against said Hall. It certainly can not be inferred that a conspiracy would be entered into by individuals of a neighborhood against another person on the ground that he was not a desirable citizen or was a worthless character, in the absence of some evidence tending to show that his worthlessness in some way affected the conspirators; and therefore the mere proof of improper acts on the part of Hall toward other parties than the defendant Rakes would not tend to show that Rakes's conduct toward him was the result of any motive other than such as he may have acquired from Hall's having informed against him as an illicit distiller.

There is not a particle of evidence indicating that the crime charged was committed by other

parties than those alleged in the indictment, and is not intimated anywhere in the record that the parties against whom these alleged threats were made had any connection whatever with the crime, and therefore the mere threat of Hall to burn the barn of some person who is not connected with the crime in the remotest degree would be wholly immaterial; and as shown in the quotation from Wigmore on Evidence, sections 139, 141, on pages 43, 44 of plaintiff in error's brief, by the majority of the courts such threats are not under any circumstances admissable, even though it be attempted to show that the party against whom made may have been connected with the crime.

Furthermore, the general rule is that it is not competent to prove the character of parties or witnesses by special acts of such parties. (Cyc. Evidence, 36, 39.)

VI.

The court committed no error in giving the instructions which were submitted to the jury, and refusing the propositions requested by counsel for plaintiff in error.

(1) It is insisted that the instruction to the jury that—

> Therefore, the second section means that if a felony or misdemeanor be committed by persons who have conspired with the intent stated in the first section in pursuance of, or in carrying into effect the purpose of such conspiracy, *the punishment for*

> *the offense under the state law shall be in this case governed by the law of Virginia.* (Par. 1, Rec., p. 179.)

There is certainly no error in this instruction, as section 5509 expressly provides that, if in violating the previous section, any other felony or misdemeanor be committed, the punishment inflicted shall be that which is attached to such felony or misdemeanor by the laws of the State in which the offense is committed—in this case, the laws of the State of Virginia.

(2) Plaintiff in error requested the jury to charge—

> That where it has been clearly proven to the satisfaction of the jury that a witness is not to be believed on oath, no statement of such witness, standing alone and of itself, is sufficient to prove any material fact beyond a reasonable doubt. (Rec., p. 178.)

The court refused this instruction, but charged the jury fully with reference to the rules governing the credibility of witnesses. (Pars. 4 and 5, Rec., pp. 179, 180.) The instruction requested should have been denied. It would have been an intimation upon the part of the court that it had been proven to his satisfaction that the witnesses on behalf of the Government were not to be believed on oath, when such was not the fact. Notwithstanding the bad character of a witness, yet it is the province of the jury to determine what credence shall be given him; and if such witness tells

a reasonable story, and conducts himself upon the witness stand in a proper manner, and is corroborated by other material testimony, the jury is well warranted in giving such witness full faith and credit.

(3) Plaintiff in error requested the court to submit to the jury the following instruction:

> The court instructs the jury that the law presumes the defendant to be innocent; that such presumption follows through the whole course of the trial; that the evidence must show the guilt of the defendant to the exclusion of every reasonable hypothesis of innocence consistent with the evidence. Therefore, in ascertaining the motive which actuated the alleged conspirators you must attribute to them any motive consistent with their innocence which can be reasonably reconciled with all the evidence. But, if you find beyond reasonable doubt that the intent was that charged in the indictment, you may find the defendant guilty of conspiring with said intent, although another or other reasons for conspiring may also have actuated some or all of the persons indicted. (Rec., p. 175.)

This instruction was refused, but in lieu thereof the court charged the jury as follows:

> Before you can find the defendant guilty of conspiring as charged, you must believe beyond all reasonable doubt that there was a conspiracy formed by the defendant and some one or more of the other persons

named in the indictment to injure, oppress, threaten, or intimidate Peter Hall because he had exercised the right of giving information of violations of the Federal internal-revenue laws. If you have a reasonable doubt as to the reason for the formation of the conspiracy charged in the indictment, you should acquit the defendant. However, the mere fact that some of the alleged conspirators may have been actuated by some motive not connected with "informing" by Peter Hall is not ground for acquittal, if you believe beyond a reasonable doubt that at least one of such other alleged conspirators and the defendant conspired to injure or intimidate said Hall, mainly and chiefly because said Hall had exercised his rights as an "informer."

There is no material difference in substance in the request and the proposition charged. The statement to the jury that "If you have a reasonable doubt as to the reason for the formation of the conspiracy charged in the indictment you should acquit the defendant," is certainly as favorable a statement upon this subject as plaintiff in error was entitled to demand; and with reference to the co-existence of the motive charged in the indictment with other motives not charged therein, the court's charge was more favorable than the request, and in fact more favorable than the plaintiff in error was entitled to.

The court upon that question substantially said that in order to find defendant guilty the jury would

have to believe beyond a reasonable doubt that "at least one of such other alleged conspirators and defendant conspired to injure or intimidate said Hall, *mainly and chiefly* because said Hall had exercised his right as an informer," when it was sufficient if such motive *materially entered into the conspiracy*. It is manifest that if this expression impressed upon the jury that they should weigh the motives of plaintiff in error, it necessarily inured to his benefit, and not to that of the Government.

(4) Paragraphs 6 and 7 of the instructions given (Rec., p. 180) are criticized because the jury were told in substance that they should consider separately the question of guilt under the charge of conspiracy and the crime of murder, and that they might find plaintiff in error guilty of the former and not guilty of the latter.

It was necessary for the jury to consider said matters separately. In all cases the jury first determines the question of guilt and then the extent of the punishment; and if, in any case, a certain circumstance, if it exists, aggravates the offense and increases the punishment, it is necessary for the jury, after ascertaining the guilt of the accused, to determine whether or not such circumstance exists. In *Davis* v. *United States* (107 Fed., 754) the jury did the very thing the court here suggested might be done, that is, found the accused guilty of the conspiracy and acquitted him of the murder.

(5) It is complained that in paragraphs 8 and 10 of the instructions (Rec., p. 180, 181) the court defined to the jury murder in the first degree, when the evidence excludes the possibility of a conviction for such murder.

It is not denied that the definition given by the court was correct. But whether the evidence would warrant such a conviction is not now a material inquiry. All the jury agreed that the elements of murder in the first degree did not exist, and that part of the charge was therefore harmless.

(6) Request number 7 (Rec., p. 180), to the effect that Grover Beaman's motive could not affect plaintiff in error's motive, unless he knew of and acquiesced in such motive, was fully covered by section 5 of the instructions given.

(7) Paragraph 11 of the instructions (Rec., p. 181) refers to the right of the jury to find whether or not plaintiff in error was guilty of murder in the second degree, which has heretofore been considered; and the various forms of the verdict suggested by the court in paragraphs 12 and 16 (Rec., p. 181) were proper, inasmuch as it was the duty of the jury to determine whether plaintiff in error was guilty of the conspiracy, and if so, whether he was also guilty of the other offense, and of what degree.

(8) Plaintiff in error's fifth request, to wit:

> In ascertaining the motive which actuated the said alleged conspirators, the jury should

> take into consideration all the relations between the said Peter Hall and all or any of the alleged conspirators shown by the evidence. (Rec., p. 175.)

is immaterial. Any juror with common sense, without any instructions with reference thereto, would know that such was the purpose of introducing evidence on that subject. The court can not be required to call the jury's attention to every thought that might arise in their minds while considering the evidence.

(9) Requests 9, 10, and 11, which in effect ask the court to charge that the accused may have unlawfully conspired with others with respect to Hall and yet that fact be wholly insufficient to render him liable for the perpetration by one of his co-conspirators of an act of violence against some other person, wholly beyond the contemplation of the accused (Rec., pp. 176, 177), were not warranted by the evidence, and are not in fact the law.

Each conspirator is liable for any act or result that may probably flow from the conspiracy, whether that particular act or result was specially contemplated or not.

(10) The 14th and 15th requests of plaintiff in error (Rec., pp. 177, 178), which relate to the motive that may have actuated the conspirators, were embraced in the 5th and 6th paragraphs of the court's charge (Rec., p. 180).

VII.

The cause should not be reversed on account of the form of the verdict.

The verdict is in the following language:

> We the jury find the within-named defendant, W. E. Rakes, guilty of conspiring as charged, and also guilty of murder in the second degree, and we fix his punishment for said last-mentioned offense at imprisonment in the penitentiary for (15) fifteen years.

As heretofore stated, it was the duty of the jury to find, first, whether or not plaintiff in error was guilty of the charge of conspiracy, and second, whether or not he committed the other offense described in the indictment, to wit, murder; and it was furthermore the duty of the jury if it found him guilty of murder to fix his punishment.

Strictly speaking, however, it may be that the jury should have applied the imprisonment to his guilt on the charge of conspiracy, and not for the offense of murder. However, this is a mere technical error in form, and does not warrant the granting of a new trial, as it was the duty of the judge to refer the punishment to the proper offense.

VIII.

The judgment of the court is in proper form; but if not, if no other error be found in the record, the proper judgment should be entered by this court.

After overruling the motions in arrest of judgment and to grant a new trial, the judgment of the court proceeds as follows:

> And it is further considered by the court that the said W. E. Rakes be imprisoned in the United States penitentiary at Atlanta, Georgia, for a period of fifteen years and one day, commencing on the day said defendant is committed to said penitentiary, and that the United States of America do recover of and from said defendant the sum of $100 fine. (Rec., p. 20.)

Learned counsel do not suggest in what other language the judgment should be couched, and we are unable to conceive of any that could be more appropriate.

For the foregoing reasons we insist:

1. That the writ of error should be dismissed for the want of jurisdiction in this court; and,

2. If mistaken in this contention, that the judgment of the court below should be affirmed.

Respectfully submitted.

J. A. FOWLER,
Assistant Attorney-General.

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